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SLOTING IN THE RETAIL GROCERY BUSINESS: DOES IT VIOLATE THE PUBLIC POLICY GOAL OF PROTECTING BUSINESSES AGAINST PRICE DISCRIMINATION?

Robert J. Aalberts and L. Lynn Judd***

INTRODUCTION

A recent development in the retail grocery business is impairing the ability of small, independent grocery stores and potential manufacturers of new food products to compete fairly with their larger, more powerful rivals. Grocery retailers have begun to demand payment from manufacturers and suppliers in exchange for grocery store shelf space. This practice has been termed "slotting" and the payments asked for by retailers are called slotting allowances.¹ Slotting is becoming an expensive and pervasive characteristic of the retail grocery business. In fact, it has been reported that as much as \$9.5 billion in manufacturers' capital, once targeted for promotions, is being siphoned off to pay for slotting.² Slotting has only become a common practice since the early 1980s.³ The practice became possible largely because grocery chains have consolidated into regional giants and now have the leverage to demand these fees. Moreover, supermarkets are now equipped with such technological advantages as computerized checkout-scanning systems. These systems enable supermarkets to quickly determine which products are, or are not, selling so that they can decide what and how much of a product to stock.⁴ In turn, the data provided by these scanning systems is also used to set the supermarkets' slotting fees.⁵

The major objection to slotting allowances is that they are not applied in an evenhanded manner by those involved in the distribution and sale of food. Those most adversely affected have been the smaller entrepreneurs and other

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1. See Gibson, *Supermarkets Demand Food Firms' Payments Just to Get on the Shelf*, Wall St. J., Nov. 1, 1988, at A1, col. 6; Taylor, *Slotting Allowances Getting FTC Scrutiny*, Supermarket News, July 11, 1988, at 1, col. 1.

2. Freeman & Meyers, *Grocer 'Fee' Hampers New-Product Launches*, ADVERTISING AGE, Aug. 3, 1987, at 1, 1.

3. *Id.* at 60.

4. Gibson, *supra* note 1, at A1, col. 6.

5. See Kanner, *Shelf Control*, NEW YORK, Jan. 22, 1990, at 22, 22.

aspiring entrants into the food market who are now limited or precluded from gaining shelf space due to the onerous costs.⁶ A case in point is Old Capital, a producer of microwave popcorn, which was required to pay \$86,000 by the Shoprite Stores to stock \$172,000 of its product.⁷ After only six weeks, when the popcorn did not sell, Shoprite removed the product from its shelves.⁸

In contrast to what has been happening to the smaller supplier, the larger established food processors are often treated with greater deference. Kraft, for example, generally pays fees only on its frozen food line.⁹ Thus, because of the supermarkets' need to stock such consumer-demanded products as Tide laundry detergent and Miracle Whip salad dressing, major manufacturers and suppliers, such as Proctor & Gamble and Kraft, receive free shelf space for these items.¹⁰

Retail grocers, in their own defense, contend that they do not have to exert any pressure on their suppliers to pay shelving fees.¹¹ In fact, retailers maintain that the larger, richer processors, who can easily afford to pay for a new or existing product line, have accepted the practice as part of the cost of doing business.¹² Moreover, the processors willingly compete against similarly situated processors by offering to pay greater slotting allowances than their competitors.¹³

The existence of slotting has thus created economic pressures which come from two directions: from that of the powerful retailer forcing the processor to pay for shelf space, and among manufacturers competing against each other to gain shelf space. Both practices are disastrous for the smaller food processor and entrepreneur. Due to these discriminatory practices, smaller companies may be effectively eliminated from selling their product. Moreover, the practice may also harm the smaller retailer who lacks the clout necessary to extract slotting fees from processors. These retailers lose a competitive edge to their bigger industry rivals who can afford to offer discounts to consumers because of the fees. Ultimately, consumers may be harmed as well. They may, for example, be deprived of product innovations and, as a result, be exposed to a restricted variety of products due to slotting.

The purpose of this Article is to discuss various antitrust implications of slotting.¹⁴ The Article begins with a brief discussion of the current state of

6. See Freeman & Meyers, *supra* note 2, at 1 (relating the story of a Utah ice cream maker who was unable to market his new product in California when two 30-store chains demanded \$20,000 each to put his product in their freezers).

7. Gibson, *supra* note 1, at A1, col. 6.

8. *Id.*

9. *Id.*

10. *Id.* at A18, col. 1.

11. *Id.*

12. *Id.*

13. *Id.*

14. While legal commentary on the practice of slotting is lacking, several articles in trade journals and newspapers have addressed the problems created by slotting. See Dagnoli & Erickson, *Grocery Retailers Get Tougher*, ADVERTISING AGE, May 15, 1989, at 4; De Santa, *Clogging the*

affairs in the grocery industry. Next, the Article discusses the history of the Robinson-Patman Act ("Act")¹⁵ and demonstrates how the Act has generally been applied. The Article then analyzes whether sections 2(d) and 2(f) of the Robinson-Patman Act are applicable to slotting. These two particular sections are covered because of their traditional applications to promotions and price discrimination in the retail business.¹⁶ Finally, some of the legal and public policy realities which might limit the efficacy of these antitrust laws on the practice of slotting are discussed.

The legal arguments advanced in this Article will assume that there is no collusion between competing retailers, between competing suppliers, or between retailers and suppliers with the intent to drive their respective competitors out of business.¹⁷ Moreover, it will be assumed that no single grocery store or chain in the trade area has sufficient market power to be considered an illegal monopoly.¹⁸ The focus of this Article will be on the Robinson-Patman

Lifblood Flow, PROGRESSIVE GROCER, Dec. 1987, at 26; Hume, *Miles Combats Slotting Beast With Information*, ADVERTISING AGE, Feb. 22, 1988, at 12; Kanner, *supra* note 5, at 22; *Slotting Allowances: Are They Here to Stay?*, SALES & MARKETING MGMT., July 1989, at 77; Stroud, *Sage Advice Keeps Vons' Stock Moving*, ADVERTISING AGE, May 9, 1988, at S-32; Therrien, *Want Shelf Space at the Supermarket? Ante Up*, BUSINESS WEEK, Aug. 7, 1989, at 60; Weinstein, *New Deal: Out of the Case and Into the Street*, PROGRESSIVE GROCER, Feb. 1990, at 39; Weinstein, *It Is a Big Deal*, PROGRESSIVE GROCER, Aug. 1988, at 92; Taylor, *supra* note 1, at 1, col. 1.

15. 15 U.S.C. §§ 13-13b, 21a (1988).

16. See, e.g., *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1978) (interpreting § 2(f) where seller was under good faith belief that it was meeting competition with the price offered and had no knowledge that it was price discriminating); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) (applying § 2(d) to defendant retailer's practice of inducing promotional discounts from suppliers who did not pass on the discounts to other retail competitors); *O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117 (E.D.N.Y. 1984) (applying § 2(d) to the alleged discriminatory use of promotional discount and rebate policies by defendant suppliers).

17. For example, if larger food suppliers coerced a grocery retailer not to buy from a smaller, upstart food supplier, this could be considered an illegal boycott. It is well settled that such collusion would constitute a violation of the Sherman Act, 15 U.S.C. § 1 (1988), which provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*; see, e.g., *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (retail store successfully brought suit against chain of department stores charging that defendant retail chain and suppliers concertedly refused to deal with plaintiff or agreed to sell to it only at discriminatory prices).

Coercion from large food suppliers which prevents smaller suppliers from dealing with certain retailers could also be challenged as an illegal, vertical, nonprice restraint in trade under the Sherman Act. 15 U.S.C. § 1 (1988); cf. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (holding that it is not a per se violation of § 1 of the Sherman Act where discounting retailer was dropped by its supplier after competing nondiscounting retailer made several complaints to supplier).

18. Under the Sherman Act, 15 U.S.C. § 2 (1988), it is illegal to monopolize. Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by impris-

Act and its applicability to slotting in an effort to demonstrate that, even under free market conditions, slotting runs afoul of the antitrust laws.

I. THE RETAIL GROCERY BUSINESS

The retail grocery business is a multibillion dollar industry. One recent report indicated that grocery stores were responsible for \$351 billion in sales in 1989.¹⁹ Supermarkets in general accounted for 73.4% of all grocery sales, and supermarket chains accounted for 50% of the \$351 billion figure.²⁰ The concentration of one-half of all grocery sales by supermarket chains is fast approaching the level of oligopoly power in the retail grocery industry.²¹ This concentration of market power has been brought about by a steady trend of mergers by supermarket chains.²² While the merger trend has subsided somewhat,²³ it has been enough to shift the balance of power between manufacturers and retailers in favor of the retailers.²⁴ Prior to the 1980s, large manufac-

onment not exceeding three years, or by both said punishments, in the discretion of the court.

Id.; see, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). The *Grinnell* Court stated:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Id. at 570. Thus, if a giant retailer possessing monopoly power intentionally uses slotting fees to exclude potential entrants into the market, or if a retailer uses slotting fees as a predatory means of acquiring monopoly power, its activities would be in violation of § 2 of the Sherman Act.

19. *Annual Report of the Grocery Industry—1990*, PROGRESSIVE GROCER, Mid-April 1990, at 1, 7.

20. *Id.* at 8.

21. An oligopoly is defined as a market "in which there are only a few sellers, or in which a few sellers account for most of the market's sales." R. POSNER, ANTITRUST 117 (1974).

22. See *Buyouts and Competition Affect Supermarkets*, CHAIN STORE AGE EXECUTIVE, Nov. 1988, at 71, 71 (discussing recent mergers as "[a] symbol of the turmoil and change that has racked the industry for the greater part of the decade").

23. The wave of supermarket mergers has subsided somewhat due, in part, to the recent Supreme Court decision in *California v. American Stores Co.*, 110 S. Ct. 1853 (1990). In *American Stores*, the Court held that a private litigant could seek an injunction to force the defendant supermarket chain to divest itself of the assets of the chain it had just acquired even after the merger was approved by the Federal Trade Commission. *Id.* at 1857-61.

That the merger wave in the grocery industry is a very real and threatening force cannot be questioned and is illustrated by the fact that 30 states filed briefs supporting the state of California in its suit against American Stores. Foust & Smart, *The Merger Parade Runs Into a Brick Wall*, BUSINESS WEEK, May 14, 1990, at 38, 38.

While mergers of large grocery retailers may be curtailed by the Court's recent decision, industry experts expect consolidation in the grocery industry to continue in the 1990s through mergers involving smaller firms. Weinstein, *Consolidations: The Urge to Merge Continues*, PROGRESSIVE GROCER, Aug. 1989, at 102.

24. Gibson, *supra* note 1, at A1, col. 6; see also Van, *New Competition in Supermarket Aisles*, Chicago Trib., Oct. 7, 1990, § 7, at 3, col. 2 ("Now retailers really have the upper hand, and everyone knows it" (quoting Stephen Hoch, professor of marketing and behavioral science at the University of Chicago)).

turers wielded more power than retail grocers and had the ability to dictate which products retailers would carry and how much retailers would pay for the products.²⁵ Today, however, the onslaught of mergers has created regional supermarket giants with vast distribution clout.²⁶

These supermarket giants have become even more powerful due to the advent of computerized-checkout scanning systems. With the aid of the detailed and itemized information that these systems provide, supermarkets are now able to calculate the profit per foot of both their shelf and warehouse space.²⁷ Thus, if an item is a tested performer which consistently brings in a profit, a supermarket is less likely to demand a slotting allowance.²⁸ However, if the item is new or is an inconsistent seller, supermarkets are likely to charge slotting fees.²⁹ This practice hurts potential food product innovators who cannot get their product to the consumer because they are unable to afford the slotting fees.

Slotting also hurts the small, independent grocer. If smaller grocery retailers do demand slotting allowances, manufacturers can simply elect to forgo the small retailer and stock their product only in large supermarket chains where they are more likely to profit.³⁰ If, on the other hand, smaller retailers do not ask for slotting fees, they will be at a disadvantage since the supermarket chains that do receive the fees will be able to offer the same products at a lower price.

Thus, because of the concentration of power in the retail grocery market, slotting is a potentially powerful tool that the already powerful supermarket chains may use to gain an even stronger market advantage over their retail grocery competitors. Further, slotting also serves to inhibit product innovation and may create complacency in large manufacturers who do not feel compelled to improve their products.³¹

25. Gibson, *supra* note 1, at A1, col. 6.

26. *Id.*

27. See, e.g., *Profit by the Square Foot*, FORBES, Nov. 28, 1988, at 248, 248 (manufacturer of frozen orange juice made its containers "shorter and stubbier" in order to decrease the amount of shelf space taken and increase the product's profit per square foot); Van, *supra* note 24, § 7, at 3, col. 2 (retailers have the upper hand in the duel with manufacturers over sales and marketing data).

28. As stated above, items with a strong and consistent demand, like Kraft's Miracle Whip or Proctor & Gamble's Tide laundry detergent, receive free shelf space. See *supra* note 10 and accompanying text.

29. New items nearly always require a considerable slotting fee and are not guaranteed a spot on the shelf unless they can quickly show a potential for profit. See *supra* notes 6-8 and accompanying text.

30. It has long been established that a unilateral refusal to deal does not constitute an antitrust violation. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (holding that, absent any purpose to create or maintain a monopoly, a manufacturer or trader has the right "freely to exercise his own independent discretion as to parties with whom he will deal").

31. Therrien, *supra* note 14, at 60, 60 ("If we had had slotting allowances a few years ago, we might not have had granola, herbal tea, or yogurt . . ." (statement of Martin Friedman, publisher of *Gorman's New Product News*, a newsletter)).

II. THE ROBINSON-PATMAN ACT: A BRIEF HISTORICAL REVIEW

As a means of better understanding the applicability of the Robinson-Patman Act to slotting, a brief historical overview of the Act is necessary. The Act itself has been a source of controversy ever since its enactment in 1936.³² It was the product of the troubled economic times that the United States encountered during the Great Depression and was drafted in response to great public outcry against the economic evils created by chain stores.³³

In the period after World War I, multilocation chain stores were exercising their economic muscle much like they do today in the grocery business. Between 1926 and 1933, for example, total retail sales from these emerging giants advanced from 9% of the retail market to 25%.³⁴ Included in this number were grocery chains, which by 1929 had seized 29% of the retail food market.³⁵ One of the prime reasons cited for the chains' successes was their ability to collusively exert direct purchasing power over suppliers.³⁶ This, of course, resulted in discounted prices for the chains at the expense of small, independent businesses.³⁷ Thus, in the early 1930s, both suppliers and small businesses successfully lobbied Congress for protection.³⁸ In 1936, after intense debate,

32. See, e.g., R. BORK, *THE ANTITRUST PARADOX* 382-401 (1978) (arguing that the Act stifles competition, but fails to prevent price discrimination); R. POSNER, *THE ROBINSON-PATMAN ACT* 23-29 (1976) (stating that the Act "constitutes one of the great failures of legislative reform"); Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 A.B.A. ANTITRUST SEC. 9, 9 (1966) ("That the Robinson-Patman Act . . . is the most controversial of our antitrust laws may be the understatement of the century."); Shniderman, *The Robinson-Patman Act: A Critical Appraisal*, 55 ANTITRUST L.J. 149, 149-58 (1986) (reviewing the controversial Act and its conflict with "hard competition"); Stedman, *Twenty-Four Years of the Robinson-Patman Act*, 1960 WIS. L. REV. 197, 218 (calling the Act "a hodge-podge of confusion and inconsistency that any competent, order-loving lawyer must find offensive").

Aside from persistent attack by commentators, the Act has also been attacked by two presidential task forces and the Department of Justice. See REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY (1968), reprinted in 1 J. REPRINTS FOR ANTITRUST L. & ECON. 633-826 (1969); REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION (1969), reprinted in 1 J. REPRINTS FOR ANTITRUST L. & ECON. 829-81 (1969); U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977) [hereinafter JUSTICE REPORT].

33. For a more detailed and thorough discussion of the events leading up to the enactment of the Robinson-Patman Act, see Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113 (1983).

34. J. PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* 7 (1955).

35. *Id.* See generally Ross, *Winners and Losers Under the Robinson-Patman Act*, 27 J.L. & ECON. 243 (1984) (discussing the economic state of affairs in the late 19th and early 20th centuries that lead up to the passage of the Robinson-Patman Act).

36. Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 ANTITRUST L.J. 921, 921 (1985) (noting that direct purchasing procedures and combined purchasing power were important to the success of the chain stores); see also J. PALAMOUNTAIN, *supra* note 34, at 1-16 (discussing the economic bases of conflict created by the new methods of organizing distribution in the early twentieth century).

37. See, e.g., Calvani, *supra* note 36, at 921 ("The success of the chain stores posed a direct threat to competing independent single unit establishments . . .").

38. See Hansen, *supra* note 33, at 1122-23 ("Independent merchants and wholesalers organized a massive campaign against the 'chain store menace.'"). The original bill, as proposed in

the Robinson-Patman Act was passed and signed by President Roosevelt.³⁹ Despite constant attack and criticism, the Act has withstood proposed amendment as it approaches its fifty-fifth anniversary.⁴⁰

III. THE ROBINSON-PATMAN ACT: ITS APPLICATION

The Robinson-Patman Act, enacted as an amendment to section 2 of the Clayton Act,⁴¹ prohibits a person engaged in interstate commerce from discriminating in price between different purchasers of commodities of like grade and quality.⁴² There are different categories of Robinson-Patman violations based on the distribution level of the competitor who claims injury. The most common categories are "primary-line" and "secondary-line" violations. Pri-

Congress, was not intended to be an antitrust statute and was entitled the Wholesale Grocers Protection Act, H.R. 8442, 74th Cong., 1st Sess. (1935).

39. 15 U.S.C. §§ 13-13b, 21a (1988). While debate regarding the Act was intense and emotional, Congress held relatively few hearings for a statute of its magnitude.

Congress held very few hearings, considering the sweeping nature of the legislation.

The House Committee held a short set of hearings on the original Patman Bill in the early summer of 1935; a few more days in February, 1936. Meanwhile the Senate Committee held no hearings on the Robinson Bill and only two days of hearings on the Borah-Van Nuys Bill in March, 1936. That was pretty much the extent of the record developed by Congress.

Statement of Donald I. Baker prepared for Hearings on the Robinson-Patman Act before the Domestic Council Review Group on Regulatory Reform (Dec. 9, 1975), *quoted in JUSTICE REPORT, supra* note 32, at 137-38.

For the legislative history of the Act, see H.R. REP. NO. 2287, 74th Cong., 2d Sess. (1936); S. REP. NO. 1502, 74th Cong., 2d Sess. (1936).

40. Congressman Patman once commented:

This law has stood the test of time. It has repeatedly been attacked and *after each encounter with its detractors, this statute has emerged stronger than ever, and it still stands as solid as the Rock of Gibraltar*—a bulwark of protection for the 9 ½ million small entrepreneurs of this great Nation of ours.

Recent Efforts to Amend or Repeal the Robinson-Patman Act: Hearings Before the Ad Hoc Subcomm. on Antitrust, The Robinson-Patman Act, and Related Matters of the House Comm. on Small Business (pt. 1), 94th Cong., 1st Sess. 6 (1975) (emphasis added) (statement of Congressman Patman).

41. The current version of § 2 of the Clayton Act appears at 15 U.S.C. § 13 (1988). Rather than beginning with § 1, the six subdivisions of the Robinson-Patman Act are denominated 2(a) through 2(f) to coincide with the denomination of the Clayton Act section that they amend.

42. Section 2(a) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a) (1988).

mary-line violations involve direct competitors of the seller.⁴³ Secondary-line violations involve competitors of favored purchasers who buy from the same seller.⁴⁴ There are also tertiary-line violations and violations at even more remote levels. Though rare, tertiary-line cases involve customers of the seller's customers.⁴⁵ Violations at a fourth, or an even higher level, are possible where a distribution system utilizes four or more levels.⁴⁶ While violations of the Robinson-Patman Act can be found at any level of distribution, these classifications are important since the ability to prove competitive injury becomes more and more difficult as the remoteness of the level increases.⁴⁷

Aside from requiring the existence of price discrimination, section 2(a) of the Robinson-Patman Act also requires some kind of competitive injury.⁴⁸ The Act delineates three possible types of injury to competition: 1) a substantial lessening of competition;⁴⁹ 2) a tendency to create a monopoly in any line of commerce;⁵⁰ and 3) an injury to, or prevention or destruction of, competition with any person who either grants or knowingly receives the benefit of the discrimination, or with customers of either of them.⁵¹ Thus, under the third category of possible injuries to competition, both sellers who offer discriminatory prices and preferred buyers who knowingly receive them are guilty of violating the Robinson-Patman Act.⁵²

43. A violation of the Robinson-Patman Act does not have to be premised on injury to competition caused by a party on a different level of distribution. Competing retailers or manufacturers may bring suit under the Act if their ability to compete is injured by one of their direct competitors. *See, e.g., Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) (plaintiff frozen dessert manufacturer brought suit against competing manufacturers alleging that competitors intentionally sold at unprofitable discriminatory prices in order to reduce plaintiff's market share); *Anheuser-Busch v. FTC*, 289 F.2d 835 (7th Cir. 1961) (national brewer who reduced the price of its beer in St. Louis while maintaining higher prices in other areas was sued because its actions caused injury to competing sellers).

44. *See, e.g., FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (salt manufacturer which provided quantity discounts to retailers and wholesalers violated the Robinson-Patman Act since not all buyers could take advantage of the discounts and those who could were able to resell the salt at lower prices than their competition).

45. *See, e.g., Falls City Indus. v. Vanco Beverage*, 460 U.S. 428, 436 (1983) ("the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers").

46. *See, e.g., Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969) ("Before an injured party can recover damages under the [Robinson-Patman] Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered. This is true regardless of the 'level' in the chain of distribution on which the injury occurs.").

47. This is generally true because the causal connection between the price discrimination and the injury to competition becomes more attenuated when the price discriminator is on a different level of distribution. *See Hansen, supra* note 33, at 1133-42.

48. 15 U.S.C. § 13(a) (1988); *see supra* note 42 (providing text of the statute).

49. 15 U.S.C. § 13(a) (1988).

50. *Id.*

51. *Id.*

52. *FTC v. Fred Meyer Inc.*, 390 U.S. 341 (1968). For a discussion of the *Meyer* case, *see infra* notes 91-103 and accompanying text.

Because of the narrow and not always clear way in which the statute was written,⁵³ there are also a number of quite specific requirements for an alleged violation to be covered under the Robinson-Patman Act. The Act will only apply if there are contemporaneous discriminatory sales⁵⁴ of commodities,⁵⁵ which are of like grade and quality,⁵⁶ by the same seller to two or more purchasers.⁵⁷ Further, there must be an actual purchase, not a lease or consignment,⁵⁸ and the transaction must actually be in interstate commerce.⁵⁹

Once a plaintiff establishes a prima facie case of price discrimination, three defenses can be raised. First, the defendant can claim that there is a cost justification for the price differential.⁶⁰ Second, the defendant may argue that there has been a change in conditions and that the cost differential is due to a change in the market, obsolescence, or perishability of the goods.⁶¹ Finally, the defendant can also claim that he was meeting the competition in good faith.⁶² This defense requires a showing that the seller was charging a discriminatorily lower price to meet its competitors' price.⁶³

While section 2(a) makes up the bulk of the Robinson-Patman Act, the Act contains three provisions which are designed to prohibit various, but more subtle, practices of price discrimination.⁶⁴ Sections (c),⁶⁵ (d),⁶⁶ and (e)⁶⁷ of the

53. See, e.g., Rowe, *supra* note 32, at 10-12 (commenting on the Robinson-Patman Act's lack of legislative clarity); see also *FTC v. Sun Oil Co.*, 371 U.S. 505, 530 (1963) (Harlan, J., separate memorandum) (referring to the Robinson-Patman Act as a "singularly opaque and elusive statute").

54. 15 U.S.C. § 13(a) (1988); see *Atlanta Trading Corp. v. FTC*, 258 F.2d 365, 372 (2d Cir. 1958) ("the time interval is a determining factor").

55. 15 U.S.C. § 13(a) (1988). The definition of a "commodity" under the Act includes tangible goods but not services. See, e.g., *Tri-State Broadcasting Co. v. United Press Int'l*, 369 F.2d 268, 270-71 (5th Cir. 1966) (holding that news information service supplied by news service company did not constitute "commodity" within meaning of the Act).

56. 15 U.S.C. § 13(a) (1988); see *FTC v. Borden Co.*, 383 U.S. 637, 639-40 (1966) (stating that milk sold under brand name and private labels which is physically and chemically identical is of "like grade and quality").

57. 15 U.S.C. § 13(a) (1988); see *Walker Oil Co. v. Hudson Oil Co.*, 414 F.2d 588, 590 (5th Cir.) (Brown, J., concurring) ("the discrimination forbidden by § 2(a) is between purchasers from a common seller-supplier"), *cert. denied*, 396 U.S. 1042 (1969).

58. 15 U.S.C. § 13(a) (1988); see *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir.) (discussing the propriety of jury instructions given on the issue of the distinction between consignment and sale), *cert. denied*, 350 U.S. 988 (1955).

59. 15 U.S.C. § 13(a) (1988); see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (holding that illegal restraint in trade must do more than "affect" interstate commerce; that is, one of the transactions must actually cross a state line).

60. 15 U.S.C. § 13(a) (1988).

61. *Id.*

62. *Id.* § 13(b).

63. *Id.*

64. Section 2(b), which does not establish the grounds of a cause of action but merely discusses the burden of proof in Robinson-Patman violations, reads as follows:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the

Act address brokerage payments extracted by large buyers, and discriminatory allowances or services, such as promotional advertising. The foregoing three sections are considered "per se" antitrust violations. This means that there is no requirement for the plaintiff to prove that there has been a lessening of competition or a tendency to create a monopoly.⁶⁸

Section 2(c), which is generally known as the brokerage provision of the Robinson-Patman Act, is a self-contained enactment, unrelated to the other sections of the Act. This section forbids a party to a sales transaction from paying a fee to the other party, his agent, or his controlled intermediary.⁶⁹ Among the prohibited payments are commissions, brokerage or other compensation, and discounts in lieu of brokerage, except for services rendered.⁷⁰ Section 2(c) is aimed at reaching "dummy" brokerage payments that are, in real-

person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination.

Id.

65. *Id.* § 13(c) (also § 2(c) of the Clayton Act) states that:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Id.

66. *Id.* § 13(d) (also § 2(d) of the Clayton Act) states that:

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Id.

67. *Id.* § 13(e) (also § 2(e) of the Clayton Act) states that:

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Id.

68. The basis for regarding §§ 2(c), (d), and (e) as per se violations was established in *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959) (finding §§ 2(c), (d), and (e) "absolute" proscriptions that require no showing of competitive injury and permit no cost justification defense).

69. 15 U.S.C. § 13(c) (1988). For the text of the statute, see *supra* note 65. See also E. KINTNER, *A ROBINSON-PATMAN PRIMER* 29-30, 225-47 (1979) (discussing at length the meaning of the section and the decisions under it).

70. 15 U.S.C. § 13(c) (1988).

ity, "under the table" price concessions eventually going to the buyer.⁷¹

Sections 2(d) and 2(e) of the Act make it unlawful for a merchandiser to pay anything of value to a customer for any services or facilities provided by the customer in connection with the resale of the product, or to actually provide the services or facilities to the customer.⁷² An exception to this can occur if the payment is made available on proportionally equal terms to all competing customers.⁷³ Under sections 2(d) and 2(e), it must be the seller who tenders payment or services or facilities to the customer.⁷⁴ While the customer is often a retailer, there is no requirement that this be the case.⁷⁵

Congress' original intent in passing sections 2(d) and 2(e) of the Robinson-Patman Act was to regulate large retailers' promotional services. Prior to the Act's passage, retailers frequently used promotional schemes to shift to their vendors a substantial amount of the retailers' own advertising costs.⁷⁶ Meanwhile, many smaller retail competitors, who could not bully their vendors in such a way, were at a competitive disadvantage.⁷⁷ Congress further intended section 2(d) to encompass much more than just promotions and advertising.⁷⁸ Hence, the words "services or facilities" were inserted in the statute rather than just "advertising allowance" or "promotions."⁷⁹

It is important to note that, while sections 2(d) and (e) of the Robinson-Patman Act are directed against the seller and not the buyer, the Federal Trade Commission ("FTC") has used section 5 of the Federal Trade Commission Act ("FTCA")⁸⁰ to prosecute buyers for engaging in unfair methods of

71. E. KINTNER, *supra* note 69, at 29-30.

72. 15 U.S.C. § 13(d)-(e) (1988). For the text of the statutes, see *supra* notes 66-67. See also *Exquisite Form Brassiere v. FTC*, 301 F.2d 499, 500 (D.C. Cir. 1961) (holding that brassiere manufacturer's discriminatory grant of advertising allowances and the furnishing of free services, such as trained sales personnel, to facilitate resale of a manufacturer's products were violations of §§ 2(d) and (e) respectively), *cert. denied*, 369 U.S. 888 (1962).

73. 15 U.S.C. § 13(d)-(e) (1988).

74. *Id.*

75. The express wording of these statutes refers to discrimination in favor of "purchasers" and never mentions the word "retailer." See *id.*

76. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 350 (1968).

77. *Id.* at 349.

78. See 80 CONG. REC. 9418 (1936). Representative Utterback stated the following:

The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities whether furnished "in connection with the processing, handling, sale, or offering for sale" of the products concerned.

Id. (statement of Representative Utterback).

79. *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 611 (4th Cir.) (stating that words "services and facilities" were used instead of "advertising allowance" in order to make the prohibitions of the statute intentionally broader), *cert. denied*, 326 U.S. 774 (1945).

80. 15 U.S.C. § 45 (1988).

competition.⁸¹ Section 5 of the FTCA prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce."⁸² This purposely broad, vague statute⁸³ was passed in order to empower the FTC to prohibit both anticompetitive conduct and to protect consumers from deceptive practices such as unfair packaging and labeling, and the use of discriminatory pricing.⁸⁴

Finally, section 2(f) of the Robinson-Patman Act is relevant to the analysis of the antitrust implications of slotting. That section states that it is unlawful for "any person engaged in commerce . . . knowingly to induce or receive a discrimination in price which is prohibited by this section."⁸⁵ Thus, under this provision of the Robinson-Patman Act, it is required that the buyer and seller have knowledge of the discriminatory price.⁸⁶

To summarize, the Robinson-Patman Act prohibits overt, as well as subtle, forms of price discrimination by sellers. The outlawed discriminatory practices include price concessions masquerading as brokerage payments, and payments tendered by a seller to a customer in exchange for the customer's services or facilities. In addition to these antitrust restrictions on sellers, buyers can also be prosecuted under the antitrust laws if they knowingly engage in price discrimination. The analysis now turns to the application of these antitrust provisions to the practice of slotting.

IV. THE ROBINSON-PATMAN ACT AND SLOTTING

Although there have been cases which challenged practices somewhat similar to slotting, there have not been any cases in which the legality of slotting has been directly tested under the Robinson-Patman Act. However, sections 2(d) and 2(f) of the Act, and some cases with fact situations similar to slotting, are particularly relevant for several reasons. One reason is that both 2(d) and 2(f) have long been applied to promotions in the retail trade business.⁸⁷

81. See, e.g., *Grand Union Co. v. FTC*, 300 F.2d 92, 98-99 (2d Cir. 1962) (finding that the Federal Trade Commission Act was intended to give the FTC the power to stop every trade practice which restrains competition or might lead to restraint if not stopped in its incipient stage).

82. Section 5 provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." 15 U.S.C. § 45 (1988).

83. *Grand Union*, 300 F.2d at 98 (§ 5 of the FTCA "did not define 'unfair competition'; the concept was left flexible, so that the Commission could apply the broad Congressional standard to the myriad of fact situations which would arise").

84. See generally 55 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* §§ 747-749 (1971) (discussing the scope and application of the FTCA).

85. 15 U.S.C. § 13(f) (1988).

86. See, e.g., *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80-83 (1978) (finding no violation of § 2(f) where seller was under good faith belief that it was meeting competition with the price offered and, therefore, had no knowledge that it was price discriminating).

87. Congress specifically passed § 2(d) in order to regulate promotional services and this section has consistently been applied to this area of the retail trade. See *supra* notes 76-79 and accompanying text (discussing the application of § 2(d) and (e) to retailers' promotional services). For a discussion of the traditional applications of § 2(f), see E. KINTNER, *supra* note 69, at 273-86;

Another reason is that because section 2(d) is a "per se" violation,⁸⁸ anticompetitive effects do not have to be proven.⁸⁹ This makes 2(d) an especially strong weapon in determining the future status of slotting as a retail practice. The following is a discussion of these sections and their possible application to slotting.

A. *The Robinson-Patman Act: Section 2(d) and Case Law*

Section 2(d) of the Robinson-Patman Act prohibits a merchandiser from paying anything of value to a customer for any services or facilities provided by the customer in connection with the resale of the merchandiser's product.⁹⁰ One case which offers guidance in interpreting section 2(d) of the Robinson-Patman Act as it pertains to slotting is the United States Supreme Court decision in *FTC v. Fred Meyer, Inc.*⁹¹ In *Meyer*, the defendant operated a chain of thirteen supermarkets in the Portland, Oregon area.⁹² As one of its promotions, Meyer annually distributed coupons to consumers which could be redeemed for price reductions of up to one-third of the regular price.⁹³ Meyer financed the promotion by charging the supplier of each featured product a fee.⁹⁴ Some, but not all, suppliers would also underwrite the promotion by granting Meyer price reductions.⁹⁵ These price reductions were granted by replacing, at no cost, a percentage of the goods sold by Meyer during the campaign.⁹⁶ The challenged activity involved two suppliers who sold directly only to Meyer, and transacted the rest of their business through wholesalers who did not receive any promotional fees.⁹⁷ None of Meyer's retail competitors

H. SHNIDERMAN, PRICE DISCRIMINATION IN PERSPECTIVE 133-50 (1977).

88. See *supra* note 68 and accompanying text.

89. See *supra* notes 48-51 and accompanying text, which point out the requirement that a lessening of competition or a tendency toward monopoly must be proved before there is a violation of § 2(a) of the Robinson-Patman Act. Thus, a food supplier who is injured by a competing supplier who initiates slotting (primary-line) or a grocer-customer victimized by slotting fees (secondary-line) could utilize these sections without having to prove the existence of anticompetitive effects. Because of the directly applicable aspects of § 2(d) and § 2(f) and pertinent case law, this Article will limit its scope to these two sections of the Robinson-Patman Act.

90. 15 U.S.C. § 13(d) (1988).

91. 390 U.S. 341 (1968); see also *O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117 (E.D.N.Y. 1984) (interpreting § 2(d) as applied to the alleged discriminatory use of promotional discount and rebate policies by defendant suppliers while denying class certification to independent distributors).

92. *Meyer*, 390 U.S. at 344.

93. *Id.*

94. *Id.* at 345. Meyer charged every supplier a fee of at least \$350 for each coupon-page advertising that supplier's product. *Id.* The sum of those fees was more than enough to cover Meyer's cost of publishing, distributing, and publicizing the coupon books. *Id.* at n.4. Meyer then charged 10 cents for each of the coupon books and was able to make a "clear profit" on the 138,700 books sold. *Id.*

95. *Id.* at 345.

96. *Id.*

97. *Id.* at 346.

bought directly from the two suppliers in question.⁹⁸ Instead, Meyer's retail competitors purchased their products from the wholesalers served by the two suppliers.⁹⁹ Therefore, Meyer's competitors were unable to benefit from the promotional allowances Meyer received from the two suppliers.¹⁰⁰ Despite the fact that none of Meyer's retail competitors were direct-buying customers of the two suppliers, the Court found Meyer guilty of unlawfully inducing suppliers to engage in discriminatory pricing and sales promotion activities prohibited by section 2(d) of the Robinson-Patman Act.¹⁰¹ The Court stated that interpreting "customers" to mean only direct-buying competitors would undermine Congress' purpose in enacting section 2(d).¹⁰² Congress intended to deter indirect price discrimination and improve the competitive position of small retailers.¹⁰³ Meyer thus fell within the reach of section 2(d) of the Robinson-Patman Act.

A second case which is useful in determining the legality of slotting is the Fourth Circuit Court of Appeals' decision in *Southgate Brokerage Co. v. FTC*.¹⁰⁴ It should be noted that the defendant in *Southgate* was found guilty of violating section 2(c), and not section 2(d), of the Robinson-Patman Act because its discriminatory pricing involved brokerage activities.¹⁰⁵ However, because the defendant often acted not as a broker, but in actuality as a purchaser inducing discriminatory payments from processors,¹⁰⁶ the *Southgate* decision still sheds light on the legality of slotting.

In *Southgate*, the defendant was a brokerage company and food distributorship.¹⁰⁷ Southgate engaged in a practice in which it would accept from food processors certain fees or discounts which it called brokerage fees.¹⁰⁸ Brokerage fees are commonly paid where a broker actually rendered services, such as warehousing and reselling, on a seller's behalf.¹⁰⁹ Southgate, however, was often not performing a broker's role, but rather bought the goods for itself in its own name.¹¹⁰ The *Southgate* court ruled that the defendant violated section 2(c) of the Robinson-Patman Act by extracting fees from vendors for purchasing, warehousing, or reselling the goods Southgate purchased.¹¹¹ The court reasoned that these fees amounted to a payment for doing the defendant's own work and so, in reality, were a mere gratuity.¹¹² Moreover, according to the

98. *Id.* at 346-47.

99. *Id.*

100. *Id.* at 347.

101. *Id.* at 357-58.

102. *Id.* at 352.

103. *Id.* at 349-52.

104. 150 F.2d 607 (4th Cir. 1945).

105. *Id.* at 609-11.

106. *Id.* at 610.

107. *Id.* at 608.

108. *Id.*

109. *Id.* at 609.

110. *Id.* at 608.

111. *Id.* at 610-11.

112. *Id.* at 611.

court, a "concealed advantage" accrued to Southgate in that it paid a reduced price for supplies.¹¹³ A buyer who purchased directly, and did not masquerade as a broker, did not obtain the same advantage.¹¹⁴ Since this was the kind of discrimination the Robinson-Patman Act was meant to forbid, the court held that there had been a violation.¹¹⁵

B. Application of Section 2(d), Meyer and Southgate to Slotting

Meyer and *Southgate* demonstrate that the practice of slotting violates section 2(d) of the Robinson-Patman Act in two ways. First, supermarkets often do not charge slotting fees to such necessary suppliers as Proctor & Gamble and Kraft, at least for some of their products, but do charge smaller competitors.¹¹⁶ This is price discrimination in its truest sense, the kind of practice condemned in *Meyer*. Secondly, section 2(d) was originally intended to be general; that is, the statute was meant to cover illegal payments for "services and facilities," as well as for promotions.¹¹⁷ Shelving and displaying products in a store constitute a type of service. Shelves are part of the supermarket's facilities. Thus, section 2(d) applies to any discriminatory payments made for these services and facilities. Because retailers did not charge for shelf space in the past, the relatively new practice of slotting should be considered a mere gratuity. As in *Southgate*, such gratuitous payments violate the Robinson-Patman Act.

In practice, not all suppliers and processors are required to pay slotting fees. *Meyer* held that treating suppliers disproportionately violates section 2(d) of the Robinson-Patman Act.¹¹⁸ In *Meyer*, only some vendors were paying for coupons and replacing their products on the supermarkets' shelves at no charge, while other vendors were not required to incur this extra cost.¹¹⁹ The case does not elaborate upon the criteria the defendant utilized in this discriminatory practice. Nonetheless, the defendant obviously favored one vendor over another for its own gain and was able to carry out its discriminatory practices because of its size and clout. In the case of slotting, some smaller vendors today are not replacing their products free, but, by paying a slotting fee, they are, in effect, discounting their product. Thus, the difference between slotting and the practice found illegal in *Meyer* is only one of method rather than of substance.

In the *Southgate* case, the court found a violation of section 2(c) of the Robinson-Patman Act in a buyer's practice of charging a vendor for some-

113. *Id.*

114. *Id.*

115. *Id.*

116. *See supra* notes 9-10 and accompanying text.

117. *See supra* notes 78-79 and accompanying text.

118. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 357-58 (1968); *see supra* notes 91-103 and accompanying text.

119. *Meyer*, 390 U.S. at 345.

thing that the buyer normally did itself.¹²⁰ The court held that such payments amount to a mere gratuity and are consequently illegal.¹²¹ Applying this holding to the practice of slotting leads to a similar conclusion. Since slotting fees are relatively recent, on account of the food chains' newly found economic strength, supplying shelf space and similar services at a price is tantamount to charging a gratuity since it is an expense the supermarkets formerly incurred themselves. Also, the supermarkets cannot attempt to call slotting fees brokerage fees since, like the Southgate Co., the grocers are buying these products for themselves for purposes of resale directly to consumers. However, even if the buyer is a broker, discrimination involving brokerage fees is illegal under section 2(c) of the Robinson-Patman Act.¹²²

C. Applying Section (d) of the Robinson-Patman Act via the FTCA

Proponents of slotting may argue that section 2(d) can only be used against sellers and that, therefore, retailers cannot be charged with a violation. While this has generally been the case, the FTC has applied section 5 of the FTCA to maintain a section 2(d) violation against a buyer. In *Grand Union Co. v. FTC*,¹²³ the Second Circuit Court of Appeals held that even though section 2(d) of the Robinson-Patman Act is used only against sellers, the FTC, using section 5 of the FTCA, can still maintain an action against the buyer if the buyer "knowingly receives allowances" under section 2(d).¹²⁴

In *Grand Union*, the defendant supermarket chain entered into an agreement with an advertising firm under which Grand Union would lease space on a sign located on Broadway in New York's Times Square for a nominal fee.¹²⁵ As part of the agreement, Grand Union was required to solicit several of its suppliers to advertise on the sign.¹²⁶ In exchange for soliciting these suppliers, Grand Union received substantial cash payments and free advertising from the advertising firm.¹²⁷ The court found that Grand Union's actions violated section 2(d) of the Robinson-Patman Act and section 5 of the FTCA.¹²⁸ The court conceded that section 2(d) refers only to sellers.¹²⁹ Nonetheless, the court reasoned that, in effect, the payments received by Grand Union lowered the cost of the supplies it purchased from the participating advertisers.¹³⁰ Therefore, Grand Union received an unfair advantage over its retail competi-

120. *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 610-11 (4th Cir. 1945); see *supra* notes 104-15 and accompanying text.

121. *Southgate*, 150 F.2d at 611.

122. See *supra* notes 69-71 and accompanying text.

123. 300 F.2d 92 (2d Cir. 1962).

124. *Id.* at 95.

125. *Id.* at 93.

126. *Id.* at 94.

127. *Id.*

128. *Id.* at 100-01.

129. *Id.* at 96 (stating that the omission of "buyer" from coverage under § 2(d), which prohibits payment for services or facilities for processing or sale, was more "inadvertent than studious").

130. *Id.*

tors in direct contravention of the purpose of section 2(d).¹³¹

The *Grand Union* holding demonstrates that grocery retailers who extract slotting allowances face potential antitrust prosecution. While the facts of *Grand Union* are not readily analogous,¹³² the underlying rationale clearly applies to the practice of slotting: Grand Union knowingly received a concession that its competitors did not. The implication for grocery retailers, especially the larger, more powerful ones, is clear. Retailers who are able to extract slotting allowances from certain suppliers gain an unfair advantage over smaller retail competitors who lack the economic clout to garner such fees. Thus, under section 2(d) both the supplier who grants discriminatory allowances and the buyer who knowingly receives them may incur liability under the Robinson-Patman Act and the FTCA respectively.¹³³

D. Robinson-Patman Act: Section 2(f)

The 1979 Supreme Court case entitled *Great Atlantic & Pacific Tea Co. v. FTC ("A & P")*¹³⁴ has significantly altered the effectiveness of section 2(f) of the Robinson-Patman Act. Section 2(f) prohibits "any person engaged in commerce . . . knowingly to induce or receive a discrimination in price which is prohibited by [the Robinson-Patman Act]."¹³⁵ In *A & P*, the defendant entered into an agreement with its milk supplier, Borden, under which Borden would supply milk to all of the defendant's Chicago area A & P stores.¹³⁶ The defendant refused Borden's initial offer since one of Borden's competitors agreed to supply the milk at a lower cost to A & P.¹³⁷ Borden then submitted a new offer which was substantially better than its competitor's, and the defendant accepted it.¹³⁸ The FTC brought suit against A & P for knowingly inducing or receiving a price discrimination from Borden in violation of section 2(f).¹³⁹ The Court held that A & P could not be liable since Borden made its second offer with the good faith intention of meeting its competitor's price.¹⁴⁰ Thus, in order for a buyer to be culpable, the seller must also have known that

131. *Id.* at 94-96.

132. In *Grand Union*, the buyer was receiving payments for successfully soliciting its suppliers to advertise with the billboard company. *Id.* at 93-94. In exchange, Grand Union received cash and free advertising from the billboard company. *Id.* In other words, Grand Union received price concessions on its supplies, but the payments came from a third party, not the supplier. Since the practice of slotting involves price concessions accorded by the supplier directly, slotting presents an even stronger case for the application of § 5 of the FTCA than did *Grand Union*.

133. See *supra* notes 80-84 and accompanying text; see also *Alterman Foods v. FTC*, 497 F.2d 993 (5th Cir. 1974) (holding that conduct of wholesaler and retailer in inducing its suppliers to participate in food shows held for buyers and customers of the wholesaler and retailer was violative of the FTCA and §§ 2(d) and (e) of the Robinson-Patman Act).

134. 440 U.S. 69 (1979).

135. 15 U.S.C. § 13(f) (1988).

136. *Great Atl. & Pac. Tea Co.*, 440 U.S. at 72.

137. *Id.* at 73.

138. *Id.*

139. *Id.* at 84-85.

140. *Id.*

it was discriminating in its pricing.¹⁴¹ In other words, even if Buyer *X* knows it is receiving a much lower price from Supplier *A* than from Supplier *B*, the price is still legal as long as Supplier *A* thinks it is in good faith meeting the price of its competitor Supplier *B*. At least one commentator has called the holding of this case the "perfect crime."¹⁴² Under *A & P*, buyers can induce lower prices from their suppliers, but are immune from liability as long as the seller does not know its competitors' prices.

In respect to slotting, section 2(f) still may apply, despite the mollifying effects of the *A & P* case. Consider the following scenario. Supermarkets are inducing smaller suppliers to pay slotting fees. These fees amount to a discounted price to the supermarket. The smaller supplier's product will now, in effect, be cheaper to the supermarket. As long as the seller is aware that it is paying fees and a larger competitor is not, the buyer would derivatively be liable as well and hence not protected by the holding of *A & P*. The pervasiveness of slotting, especially the selective nature in which it is practiced, will create a genuine issue of doubt as to a supplier's claim of innocence or good faith.

It should be further noted that under section 2(f), it is illegal for a buyer to induce a supplier to grant discriminatory allowances, as well as discriminatory prices. This was one of the holdings made by the FTC and upheld by the Court in the aforementioned *Meyer* case.¹⁴³ It is currently a common practice in the retail grocery industry for economically powerful retailers to demand slotting allowances from small or new suppliers in exchange for grocery store shelf space.¹⁴⁴ Further, not all retailers are powerful enough to command slotting fees. Thus, a major chain can induce a supplier to pay slotting fees and that same supplier will not necessarily grant the same concession to other retailers. In such a case, the buyer has induced the seller to grant a discriminatory allowance. Under the rationale of *Meyer*, the buyer has violated section 2(f) of the Robinson-Patman Act.

V. LEGAL AND POLICY CONSIDERATIONS

The current political climate disfavoring the enforcement of the Robinson-Patman Act and the FTCA may be one of the most formidable barriers to a victim who decides to fight the practice. Likewise, the federal courts in the last fifteen years have increasingly construed antitrust laws narrowly, rendering aspects of these laws nearly irrelevant.¹⁴⁵ Both trends have been particularly

141. *Id.* at 82-83.

142. Rosner, *Buyer Liability*, 53 ANTITRUST L.J. 999, 1016 (1984) (stating that the "perfect crime" can be perpetrated where a buyer gets the lowest possible price from seller *A* and then truthfully quotes that price to buyers *B*, *C*, and *D* and asks those buyers to meet *A*'s price).

143. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 345-46 (1968) ("by inducing the suppliers to discriminate in price, respondents had violated § 2(f) of the Act").

144. This is precisely what the practice of slotting entails. *See supra* notes 1-13 and accompanying text.

145. *See generally* Hollander & Sheffet, *The Robinson-Patman Act: Boon or Bane for Retail-*

true of the Robinson-Patman Act. From 1975 to 1982, for example, the FTC issued only six Robinson-Patman complaints and from 1983 to 1985, none were issued.¹⁴⁶ The courts are also increasingly requiring Robinson-Patman victims to prove that both they and their competition suffered actual damages,¹⁴⁷ as well as permitting, as in the *A & P* case, an unscrupulous buyer to extract discriminatory prices if the seller feels the price is being offered in good faith.¹⁴⁸

The FTC's reluctance to enforce some antitrust laws stems largely from the Reagan Administration's opposition to the regulation of business.¹⁴⁹ The Supreme Court's likely direction, at least in regard to the Robinson-Patman Act, is a pro-competitive policy espoused in the 1978 case of *National Society of Professional Engineers v. United States*.¹⁵⁰ In that case, the Court found a violation of the Sherman Antitrust Act where a society of professional engineers enacted a canon of ethics under which members of the society were prohibited from submitting competitive bids for engineering services.¹⁵¹ The Court noted that in the Sherman Act, Congress sanctioned competition as "the heart of our national economic policy."¹⁵² And, indeed, there is no dearth of scholarly literature on the Robinson-Patman Act's purportedly negative impact on competition.¹⁵³ Thus, because of the executive branch's laissez-faire attitude toward business and because of the judiciary's emphasis on the importance of competition, enforcement of the Robinson-Patman Act is becoming increasingly unlikely.

One possible avenue of relief for the smaller competitor is private enforce-

ers?, 31 ANTITRUST BULL. 759 (1986) (pointing to the fact that even 50 years after the passage of the Robinson-Patman Act, independent retailers still have a smaller share of United States market than they did in 1936, as evidence of the ineffectiveness of the Act).

146. Whiting, *R-P: May It Rest In Peace*, 31 ANTITRUST BULL. 709, 711 (1986).

147. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1980) (holding that once a violation of § 2(a) has been proved, petitioner is still not entitled to "automatic damages" but must prove antitrust injury and damages).

148. *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979).

149. R. CORLEY & O. REED, *THE LEGAL ENVIRONMENT OF BUSINESS* 682 (1987); see also Sansolo, *Grocers and Government*, *PROGRESSIVE GROCER*, March 1988, at 13, 13-14 (chairman of the FTC comments that the Robinson-Patman Act should be re-examined by Congress, due to its anti-competitive, anti-consumer aspects, to see if it is still necessary today).

150. 435 U.S. 679 (1978).

151. *Id.*

152. *Id.* at 695 (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

153. See, e.g., Austern, *Isn't Thirty Years Enough?*, 30 A.B.A. ANTITRUST SEC. 18, 24 (1966) (claiming never to have found a situation where a Robinson-Patman judgment resulted in any increase in competition); Backman, *An Economist Looks at the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SEC. 343, 357 (1960) ("In its preoccupation with the elimination or modification of price differentials, the Robinson-Patman Act tends to foster a poorer allocation of resources . . ."); Levi, *The Robinson-Patman Act—Is it in the Public Interest?*, 1 A.B.A. ANTITRUST SEC. 60, 75 (1952) (calling for "an attempt to evolve a more coherent philosophy for the preservation of competition"); Stedman, *Twenty-Four Years of the Robinson-Patman Act*, 1960 WIS. L. REV. 197, 219 (arguing that the Act may interfere with practices that seem competitively desirable and that it may deprive buyers and sellers of efficiency, volume production, and volume sales).

ment.¹⁵⁴ In fact, at least one commentator has maintained that the Robinson-Patman Act retains in the 1980s a great deal of support among small businessmen, perhaps even more now than in the 1930s when it was passed.¹⁵⁵ It should be noted, however, that the Federal Trade Commission Act vests the FTC with exclusive authority to enforce section 5.¹⁵⁶ As such, private enforcement is precluded under this section.¹⁵⁷

CONCLUSION

In light of new practices such as slotting, it will be interesting to see what the future has in store for the retail grocery industry and antitrust laws in general. Indeed, the FTC is aware of and has researched the practice with the possibility of launching a full-scale investigation.¹⁵⁸ Thus, it is not inconceivable that President Bush's call for a "kinder, gentler nation," combined with a possible trend toward protecting consumers and small businesses with more regulatory action, such actions may signal a change in public policy.¹⁵⁹

154. That private enforcement is a viable alternative was made clear in the recent Supreme Court decision of *California v. American Stores Co.*, 110 S.Ct 1853 (1990). See *supra* note 23 for a brief discussion of that decision.

155. Ross, *supra* note 35, at 244; see also Shniderman, *The Robinson-Patman Act and the Supreme Court*, 31 ANTITRUST BULL. 665 (1986) (examining Robinson-Patman decisions from 1978-1985 and concluding that the Act has "staying power" and that the Court is leaning toward a pro-competitive application of the Act). Not surprisingly, in a 1987 poll of executives and wholesalers in the grocery business, the larger firms were much more pleased with the current way that the Robinson-Patman Act was working than smaller firms. See *Annual Report of the Grocery Industry—1987*, PROGRESSIVE GROCER, April 1987, at 1, 4. In a 1988 poll, it was further found that co-op wholesalers are the most vocal complainers about the current way the Robinson-Patman Act is enforced. See *Annual Report of the Grocery Industry—1988*, PROGRESSIVE GROCER, April 1988, at 1, 9.

156. 15 U.S.C. § 45 (1988).

157. See, e.g., *La Salle St. Press v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968) (holding that private litigants may not seek relief under § 5 of the FTCA since the Commission has original jurisdiction), *aff'd*, 445 F.2d 84 (7th Cir. 1971).

158. Freeman & Dagnoli, *FTC Centers its Sights on Slotting Allowances*, ADVERTISING AGE, July 4, 1988, at 1, 1; Taylor, *supra* note 1, at 1, col. 1.

159. Calderwood, *Antitrust in The Bush Era*, NAT'L L.J., Dec. 26, 1988, at 13, 13.